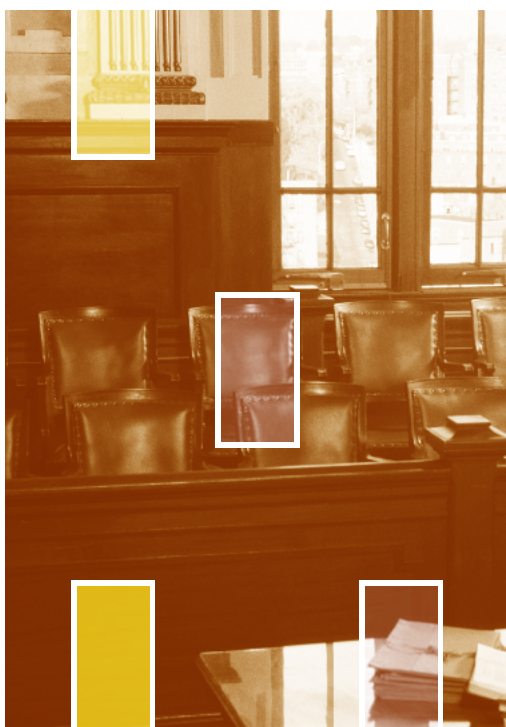


Communicating with Juries:

How to Draft More
Understandable Jury Instructions



Peter M. Tiersma

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Introduction

Jurors are an indispensable part of our system of justice. Whether we like it or not, the federal Constitution, as well as most state constitutions, provides criminal defendants and many civil litigants a right to trial by jury. Yet this right has little meaning if jurors do not properly understand the law that governs their decisions.

The ultimate task of jurors is to reach a verdict in the case before them. It's possible to imagine a system in which jurors decide not just the facts of a case, but also the law that should be applied to those facts in order to reach a verdict. In fact, for many centuries English jurors received very little, if any, instruction on the law. In the early days of the United States, jurors were also given substantial freedom to decide legal issues. In part, this freedom rested on the great confidence that the country's founders had in the good sense of the common man.

Gradually, however, the modern notion developed that the jury's function is to determine what happened, or the facts, as well as to reach a verdict. It has become the exclusive duty of judges to decide the rules of law that apply to those facts. Of course, once judges decide what the relevant rules of law are, they have to communicate those rules to the jury. This is the function of jury instructions.

Jury instructions must therefore *communicate* the law to jurors. Bear in mind that communicating is different from merely *speaking* or *reading* to someone.

You can speak to someone without that person understanding what you said, as happens when the hearer does not share the speaker's language. Communication, in contrast, requires not just that you speak or read to someone but also that the audience actually understand what you intended to communicate. Otherwise, your attempt to communicate has failed. Simply reading jury instructions to jurors cannot, by itself, be considered communication.

This article aims to provide some basic rules for effectively communicating with juries. It is based on research conducted on legal language, juror comprehension, and plain-English principles during the past two or three decades, as well as my own experience as a member of a task force charged with drafting more comprehensible instructions in California. The article begins with some of the broader principles of clear communication and writing, then progresses to more specific principles relevant to jury instructions, and finally makes suggestions for applying these principles to drafting instructions.

General Principles for Clear Communication

Good writers understand who their audience is and address that audience in language that its members are likely to understand. For jury instructions, this requires using ordinary English and following some other plain-language guidelines.

Keep Your Audience in Mind

A cardinal principle for any writer is to continually bear in mind who the audience is. A brief addressed to the Supreme Court is going to be written differently from a letter to a client that explains the terms of a will or divorce decree. A hallmark of good lawyers is that they understand the law so well that they can explain it in plain language to their clients. One of the lawyer's most important skills, in other words, is the ability to translate legal concepts and legalese into ordinary English.

For jury instructions, your audience is obviously the members of the jury. The pools from which jurors are drawn vary throughout the country, and even within a single geographical area. Every jury is going to be somewhat different. So it's no easy matter to decide exactly who your audience is, and in particular what their educational level and reading or comprehension abilities are likely to be.

While it might seem appropriate to draft instructions that all jurors will understand, it may be an unrealistic goal. After all, the law can be quite complex at times. In addition, observing the trial and listening to the lawyers' closing arguments will — to a limited extent, at least — help jurors

understand the legal rules. And jurors will have a chance to discuss the instructions when they deliberate. At the same time, it's important to bear in mind that the attorneys will slant the discussion of instructions in their favor, and although deliberation may help jurors understand the law correctly, it can also lead to one or more of them persuading the rest to incorrectly interpret the instructions. Thus, argument by counsel and deliberation cannot be counted on to cure defects in poorly communicated instructions.

Even though instructions may never be clear to *all* jurors, it seems reasonable to demand that, at a minimum, our instructions effectively communicate the law to the *average* juror. If they do, we can safely assume that in most cases the majority of jurors will correctly understand the law.

As a practical matter, we can probably assume that the average juror has graduated from high school. Thus, a reasonable assumption is that our audience will be able to read and comprehend at roughly a 12th-grade level. Sometimes it helps to imagine that you are explaining some legal concept to your hairdresser, a waiter at your favorite restaurant, or some other relatively "ordinary" person.

Adopt an Appropriate Style and Tone

The courtroom tends to be a formal place. Such an environment seems to promote equally formal — and sometimes flowery or even pompous — language. Judges are not immune to this inclination. In addition, jury instructions provide one of the few occasions for the judge to address the jurors during the trial. Most of us like to make a good impression and show our erudition in these situations by using elevated and educated language.

But formal language tends to reduce comprehension — especially by people who have had relatively little education, since we tend to learn formal language in school. In addition, formality creates distance between a speaker and the audience. These considerations suggest that jury instructions should not be too formal. Modern jurors are more likely to follow their charge if they feel themselves to be part of a cooperative enterprise geared toward finding the truth than if they feel like foot soldiers being ordered about by an imperious commander.

At the same time, a certain level of formality can remind participants that a trial is a serious event and can preserve respect for the judicial system. Street slang would be completely inappropriate in this setting. As with many things in life, it is best to aim for the happy medium. Generally, jury instructions should be dignified without being unduly formal.

Use Logical Organization

Presenting information in a logical manner makes it much easier for the audience to understand. Stories, for instance, are easier to follow if they are told chronologically. While relating events in random order or using flashbacks may be an interesting literary device, it can be frustrating for the reader, who is forced to piece together all these bits of information into a logical sequence.

Jury instructions do not tell a story, so a chronological organization is often not relevant. To some extent, however, the chronology of a trial does suggest a principle of organization: try to present information to jurors when it's relevant to their task. Many judges give virtually all instructions at the end of a trial. Yet it makes sense to give jurors some basic information about the trial before it begins. At a minimum, jurors should be given an outline of how the trial will proceed, the rules of evidence that they will be expected to apply, and a brief introduction to the relevant cause of action or crime being charged. They will remember the evidence much better if they understand from the beginning what is going to be important and what is not. In many American courts, the current practice, which inundates jurors with a mass of poorly organized facts and only later explains the cause of action or elements of the crime, is truly absurd. It would make much more sense to give most of the instructions at the beginning of the trial and to give a brief summary, along with a written copy of the earlier instructions, just before deliberations begin.

For individual instructions, several basic organizational principles should be borne in mind:

- ▶ *Put the most important things first.*
- ▶ *Put the general before the specific.*
- ▶ *Put the overall statement or rule before any conditions or exceptions.*

Jury instructions should not sound like a Victorian-era statute that starts with a lengthy recitation of *Whereases*, continues with a long list of exceptions and provisos, and then finally gets to the meat of the matter. Instead, give the general rule first; then move on to explain any relevant exceptions.

There are other principles of organization that can be applied to instructions. One is to use headings. At least when a jury is given a written copy, having a heading or title at the top of each instruction will help jurors find the relevant instructions during their deliberations. Numbered lists are also useful. Whenever the jury is given various elements or factors to consider — the elements of a crime, for example, or factors to consider in determining the believability of witnesses — they should be presented in a list.

Incidentally, lawyers and judges almost instinctively realize that crimes and causes of action are typically defined by a series of elements, each of which must be met, and that, in contrast, factors do not all have to be met but rather are items to consider in reaching a decision. It's important to point out this distinction to jurors in some way. For example:

The defendant is guilty of theft by larceny if the state has proved that each of the following elements is true:

1. *The defendant took [insert name]'s property without his or her consent;*
2. *The defendant intended to permanently deprive [insert name] of the property; AND*
3. *The defendant moved the property, even if only a small distance, and kept it for some period of time.*

On the other hand, factors might be introduced as follows:

It's up to you to decide whether to believe a witness. In evaluating a witness's testimony, ask yourself the following questions:

1. *How well could the witness see or hear the things that the witness testified about?*
2. *How well was the witness able to remember and describe what happened?*
3. *Did the witness understand the questions and answer them directly?*
4. *Did the witness seem believable to you?*

In my view, the most understandable way of presenting factors is in the form of questions, as in the example above.

Be as Concrete as Possible

Laws tend to be stated in very abstract and general terms, so that they apply to any person and any activity falling within their scope. There are good reasons for using broad and abstract language when defining crimes, for example. But after a crime has actually occurred, the issue at trial is whether the defendant committed it, so the question is now very concrete. That's why reading to jurors out of the statute books is not a good idea. Not only are statutes full of difficult language, but they do not tell jurors how to carry out their task. While statutes are typically phrased in such abstract terms as *any person who does X is guilty of a misdemeanor*, the jury's job is to decide whether the defendant did X. Unlike a code or compilation of laws, the instructions should not consist of a list of abstract legal principles. Rather, they should tell jurors how to reach a verdict.

Use Understandable Vocabulary

Most of us can remember being confronted in law school with a huge amount of unfamiliar vocabulary. If you can't remember back that far, perhaps you have read a book or gone to a lecture about philosophy or linguistics. Or you may have tried to figure out a manual on how to program a computer or other gadget, only to find that you don't understand much because the manual contains too much technical terminology. When you use legal terms every day, it's easy to forget how strange the vocabulary can sound to nonlawyers. Thus, one of the most basic principles of comprehensible jury instructions is to use understandable vocabulary.

1. Technical vocabulary

The average person has some general knowledge of how the legal system works, together with knowledge of some basic legal terminology — words like *judge*, *defendant*, *jury*, and *bailiff*, to name just a few. Such words are unlikely to cause much trouble in most circumstances, so they can be incorporated into jury instructions without problem.

Most legal terms, however, are unknown to the general public. And some — like *estoppel*, *lis pendens*, *per stirpes*, *tortfeasor*, *quitclaim*, and *quash* — are completely mystifying to ordinary speakers of English. In one sense, these words are the easiest to deal with. Because they are so obviously technical terms, everyone realizes that we should avoid using them in jury instructions. To take another example, in most jurisdictions proof by a *preponderance of the evidence* means that it is more likely than not that something is true. So if Jill must prove that Jack is her father, it is simpler to say that *Jill must prove that it is more likely than not that Jack is her father*, rather than *Jill must prove by a preponderance of the evidence that Jack is her father*. In this way, the unfamiliar legal term is eliminated entirely.

Another class of legal words that causes problems for nonlawyers consists of words ending in the suffixes *-or* and *-ee*. Often, they come in matched pairs, like *mortgagor* and *mortgagee*, or *vendor* and *vendee*. Such words can be useful in legal writing; it's handy to be able to use *assignor* for the person who assigns an interest in property and *assignee* for the person to whom it is assigned. But these terms tend to confuse the public. Very few people signing a lease know whether they are the *lessor* or the *lessee*.

Even lawyers sometimes pause to contemplate whether a homeowner is the *mortgagor* or the *mortgagee*. When possible, then, you should use less confusing terminology. *Borrower* and *lender* can normally be used instead of *mortgagor* and *mortgagee*. The same is true for *landlord* and *tenant*, which can generally substitute for *lessor* and *lessee*.

But you can't always avoid legal terms by substituting ordinary language. Sometimes a term is so entrenched that lawyers and perhaps even jurors simply expect to hear it. Legal terminology can also be a convenient shorthand. While the preponderance standard can usually be expressed in a few words, the reasonable-doubt standard typically requires a long definition (except for the few enlightened jurisdictions that accept the straightforward "firmly convinced" standard). If a recurring technical term like *reasonable doubt* cannot be replaced by a word or two of ordinary English, it may be best to go ahead and use the term. Of course, in that case it will have to be defined.

Unfortunately, judges do not always define legal terminology that they use in their instructions. There are a fair number of cases in which jurors have looked up words in a dictionary during deliberations — technically a type of misconduct. Examples from reported cases include *assault*, *battery*, *culpable*, *custody*, *entrapment*, *inference*, *insanity*, *legal cause*, *malice*, *malpractice*, *motive*, *murder*, *negligent*, *possession*, *premeditate*, *preponderance*, *proximate*, *prudent*, *rape*, *reasonable*, *undue*, *utter* (as in *utter a forged check*), and *wanton*. While most cases have found this type of error to be harmless, the conduct reveals that jurors often do not understand legal terminology.

Mostly, of course, judges make an effort to define a term of art. But they sometimes forget a basic principle: make sure that the definition uses simpler vocabulary than the word being defined. There are several reported cases in which California juries in death-penalty cases asked the judge to define the word *mitigation*. California eventually added a definition to its instructions, explaining that mitigation is an "extenuating circumstance." This is not very helpful. Jurors who don't understand the word *mitigate* are even less likely to know what *extenuate* means.

Finally, with some technical legal phrases, people are likely to try to "parse" the phrase or guess at its meaning. People have been known to think that *proximate cause* means "approximate cause," for instance. Likewise, people might parse the term *malice aforethought* and assume that it requires ill will in the ordinary sense of the word *malice*, even though the law of murder does not normally require that the killer have borne ill will toward the victim. Avoiding such a phrase entirely might be the best approach, but that's not always possible. It might then be useful to advise the jury that a word or phrase does not mean what they might think. Thus, an instruction on *malice aforethought* might include a warning along these lines: *Unlike its meaning in ordinary language, "malice" in the phrase "malice aforethought" does not require that the defendant have had ill will or bad feelings toward the victim.*

2. Technical terms that are also used in ordinary speech

An additional problem arises when a legal term is known by the general public but has a legal definition that differs from its ordinary meaning. In my book *Legal Language*, I refer to these as “legal homonyms.” Sometimes the legal meaning is more specific than the ordinary meaning. Most people are familiar with concepts like *beyond a reasonable doubt* and *negligence*, for example, but only in a general sense. People do not understand the nuances that have often been refined by hundreds of years of precedent. Obviously, terms of this kind should be avoided if possible or should be defined if they cannot be avoided.

Even more problematic are legal words and phrases that are known to the public but have a legal meaning that is not merely more specific but significantly different from its ordinary meaning. Consider the term *personal property*, which for most people means something like “personal effects,” but which legally includes just about anything that is not *real property*. Another example is *filing a complaint*, which normally means taking a letter you have received from a disgruntled person and placing it in a filing cabinet.

The names of several crimes are legal homonyms. In ordinary usage, a *burglary* occurs when someone breaks into a house and steals something. Legally, of course, the person need only have an intent to commit some sort of crime inside and need not actually steal anything. Likewise, *mayhem* popularly refers to a wild party or massive disorganization, while legally it requires the cutting or mutilating of body parts.

Special care must be taken with all these terms because they are potentially so confusing. Moreover, psychological studies have shown that it is very hard to dislodge the ordinary meaning of a word once the meaning is established. As in the example of *malice aforethought*, it’s worth alerting the jury that the legal definition of *burglary* is different from how they ordinarily use the word. Thus, you might consider specifically informing the jury that a burglary does not require that the defendant have stolen something.

3. Archaic, formal, and unusual words

Because some legal concepts are quite old and the profession’s drafting practices are relatively conservative, lawyers tend to use a lot of archaic and unusual language. Perhaps this was less of an issue several decades ago, when many people were familiar with Shakespeare and the King James Bible. Now we live in the age of television and have a much more oral culture, so archaic language should be avoided when communicating with the ordinary public.

A common type of archaic language still sometimes found in jury instructions involves adverbs beginning in *here-*, *there-*, and *where-*, such as *herein*, *therewith*, and *whereunder*. Besides being somewhat anachronistic, a term like *herein* is not very clear. In a statute, for instance, it is usually impossible to know whether *herein* refers to the subsection in which it occurs, the entire section, the entire chapter or act, or maybe even the entire code. In jury instructions, it may not be clear whether *herein* refers to that specific instruction or the entire charge or maybe even the whole trial.

Also problematic are the words *said*, *aforesaid*, and *such* when used in the sense of “the,” “this,” or “that.” Instead of saying *said admonition* or *such order*, it’s almost always better to say *the admonition* or *that order*.

You should also strive to use ordinary vocabulary instead of more difficult and uncommon words. Lawyers seem to have a strong preference for *commence* and *terminate* when *begin* and *end* mean exactly the same thing. Jury instructions continually refer to *determining* or *concluding* something, when *deciding* would do just as well. Below are some other terms to avoid, along with possible substitutes:

Uncommon term Possible substitute

admonish	tell
advise	tell, instruct
at the time when	when
corroborate	support
credible	believable
demeanor	behavior, appearance
discredit	do not believe
discrepancy	difference, inconsistency
erroneous	wrong
impartial	fair, unbiased
in the event that	if
misrecollection	forgetfulness, inaccurate memory
pertain to	relate to
prior to	before
pursuant to	under
stipulate	agree, admit
subsequent to	after
utilize	use
veracity	truthfulness

It’s a mistake, though, to think that long words are bad and that shorter is always better. As a general rule, that’s true, but there are lots of exceptions. Consider words like *helicopter*, *ambulance*, *hospital*, and *automobile*, all of which contain three or four syllables but are perfectly understandable to the average citizen. In contrast, short words and phrases like *quash*, *en banc*, *dower*, and *in rem* are completely inscrutable to most people.

4. Statutory language

Archaic and unusual language is an even bigger problem when it is in a statute that forms the basis for an instruction. Theoretically, the principles of the previous section should apply: try to find a good, understandable synonym for the uncommon word or phrase. For instance, a statute might provide that when assessing the credibility of a child witness, the fact-finder should consider the child’s *cognitive* development. Outside of academic circles, *cognitive* is not a very common word. *Mental* development seems like a reasonable substitute.

But using a synonym is not always possible. Consider the definition of murder, which requires *malice aforethought*. In California, this difficult term is defined by statute (as well it should be!), but the cure is worse than the disease. Penal Code § 188 explains that malice aforethought can be implied *when the circumstances attending the killing show an abandoned and malignant heart*. Clearly, almost no ordinary person has any idea what an *abandoned heart* is, and *malignant heart* is only marginally better. To be found guilty, the perpetrator seemingly needs to have been abandoned by her parents as a child or to have some kind of cancer.

Once again, the best approach, if possible, is not to use such terminology at all and to explain it in ordinary language. Often, there are judicial opinions that contain helpful explanations. Sometimes, you may need to say it in your own words because there is no case law on the subject or because the judicial opinions themselves are phrased in obscure legalese. For instance, if a statute makes it illegal to *utter* a forged check, it may suffice to say that the defendant is guilty if he or she *paid for goods or services by offering or giving someone a forged check*. I sometimes call this the “substitution approach” because you avoid the problematic language altogether and substitute a more understandable term.

Judges who fear being overruled if they deviate from statutory language may have to use the alternative — and somewhat less desirable — “definition approach.” A judge may feel it safer to instruct the jury that the defendant is guilty of murder if he killed someone with an *abandoned and malignant heart*, and then define what that term means in more comprehensible language. In fact, an approach used by some jurisdictions is to read the entire relevant statute to jurors and then explain what it means — thus insulating the instructions from the argument that they did not track the statute. On the other hand, this approach may confuse jurors by presenting what seem to be two different standards.

Don’t Be Afraid of Pronouns

Lawyers and judges have a tendency to avoid using personal pronouns, especially *I* and *you*. Thus, older jury instructions almost always started with the phrase *the court instructs the jury*. Using the third person to refer to oneself strikes people as

rather pompous these days. And if you are speaking to jurors, why not just address them as *you*? If you are asking a waiter in a restaurant to bring you a salad, you would never say, *The customer requests the waiter to bring him a salad*.

Not only do judges and lawyers try to avoid *I* and *you*, but they normally exhibit a strong preference for repeating nouns, rather than using a pronoun. Thus, an instruction might tell jurors that *if you find the defendant guilty of murder, you must then decide whether the defendant...*, instead of using the more natural *he* or *she* for the second occurrence of *defendant*. Notice that in this example there is absolutely no chance that using a pronoun will produce ambiguity, so there is no sound reason to avoid it.

Try to Use Verbs Instead of Nouns

Another general principle of clear communication is to use verbs when referring to actions, not nouns derived from verbs (which are called “nominalized verbs” or simply “nominalizations”). Compare the following verbs and the related noun forms:

<i>Verb</i>	<i>Noun</i>
act	action
consider	consideration
demonstrate	demonstration
fail	failure
prove	proof
see	sight

Note that verbs can often be nominalized by adding *-ion* to the end, as with *demonstrate*.

The related verb is normally more direct than the nominalization. Instead of telling jurors to *take into consideration*, why not just ask them to *consider* something? And nominalizations may encourage the speaker to leave out the actor. Thus, an instruction might tell jurors that *conviction of the defendant requires proof beyond a reasonable doubt*. Both *conviction* and *proof* are nouns derived from verbs. Using the verb form encourages you to specify who must do the convicting and proving: *You may convict the defendant only if the People have proved beyond a reasonable doubt that....*

A former jury instruction from California shows how overusing nominalizations can lead to obscurity:

Failure of recollection is a common experience, and innocent misrecollection is not uncommon.

The words *failure*, *recollection*, and *misrecollection* are all nouns derived from verbs. Moreover, *recollection* is not a very common word (why not just say *remember*?), and *misrecollection* does not appear in my dictionary. Even law students have trouble explaining what this instruction means. My best effort:

People often forget things, or they may honestly believe that something happened even though it turns out later that they were wrong.

Keep Your Grammatical Constructions Simple and Straightforward

We turn now to some syntactic issues. “Syntax” refers to the rules governing how words are strung together into sentences. Traditionally, many people refer to this as “grammar.”

1. Try to keep sentences relatively short

Our ability to store items in short-term memory is quite limited. Most of us can retain around seven or eight items in short-term memory. (That’s why telephone numbers consist of seven digits.) Very roughly speaking, we hold words in short-term memory until we can make sense of them and store the meaning in long-term memory, thus opening space in our short-term memory for additional linguistic input. But if the sentence is too long and complex, we cannot make sense of the words in short-term memory and need to purge it in order to make room for new input. Or we can try to block any new input until we process what is in short-term memory. Either way, comprehension will suffer. It’s easier to process complex information on paper because we can spend more time trying to parse it. This is one reason to provide written instructions. Yet even in writing, length and complexity tend to reduce comprehension.

Incidentally, it’s not length per se that presents difficulties, but complexity. As a practical matter, though, long sentences are almost always more complex. So try to keep sentences relatively short. Often enough, a long sentence can be shortened simply by adding a period in an appropriate place. More commonly, the sentence will require some rewriting.

2. Also try to keep sentences relatively simple

As mentioned, the real danger is the complexity of sentences, rather than length itself. Consider another former instruction from California:

You must never speculate to be true any insinuation suggested by a question asked a witness.

This sentence is not long, but it's very convoluted. Linguistically, it's an amalgamation of the following simple sentences:

You must never speculate.

Any insinuation is true.

Someone asks the witness a question.

The question suggests the insinuation.

Once we unpack the sentence in this way, a remedy becomes evident. Assuming that we wish to retain most of the original terminology, we can rearrange the word order and recombine these simple sentences into two more understandable sentences:

Someone might have asked a witness a question that suggests an insinuation. You must not speculate whether such an insinuation is true.

A better approach is to start from scratch and ask ourselves exactly what concepts we wish to communicate. The main idea, it seems to me, is that questions are not evidence, but the witness's answers are. Secondly, we wish to tell jurors that the question may be useful in understanding an answer. At the same time, we do not want jurors to draw any inferences from the fact that a question is asked or from

the way it is worded. We might therefore draft an instruction along these lines:

Questions are not evidence. Only the answer is evidence. You should consider a question only if it helps you understand the witness's answer. Do not assume that something is true just because a question suggests that it is.

3. Use ordinary word order

Legal language is often characterized by unusual or even convoluted word order. Sometimes this practice might be justified as reducing the possibility for ambiguity. In jury instructions, however, it makes the language seem stilted and can cause more ambiguity than it prevents.

Most sentences in English have what linguists call an "SVO" word order: subject-verb-object. Thus, in simple sentences the first noun is normally the subject (and also the actor). Next comes the verb, which explains what the subject did. And then we have another noun, the object of the verb, relating to the person or thing that receives the action. Obviously, many sentences are syntactically more complex than this basic SVO structure would suggest. Jury instructions convey difficult concepts, so a certain amount of linguistic complication is unavoidable. But syntactic complexity should be reduced as much as the content will allow.

One example of unusual word order is what are called "misplaced modifiers":

If in these instructions any rule, direction, or idea is repeated....

A study found that some people understood this sentence to refer to repeating the instructions themselves, as opposed to

repeating a rule or idea. It's not hard to grasp why people might assume that the first noun (*instructions*) is the subject, as it would be in a basic SVO sentence. The problem can be avoided by rewording:

If any rule, direction, or idea is repeated in these instructions....

Even better is to eliminate the unnecessary passive construction:

If I repeat any rule, direction, or idea in these instructions....

Or even more plainly:

Just because I repeated something in these instructions does not mean it's more important than anything else I told you.

If you find that your sentences appear too convoluted, try to identify the subject, the verb, and the object (if any). You'll often find that starting out with this basic sentence structure helps solve the problem.

4. Avoid multiple negation

There is nothing wrong with negation (which is expressed by words like *not* or *never*, as well as other words and prefixes, like *in-* or *un-*, that have an equivalent meaning). After all, the law is largely about what people should *not* do. Once a sentence has two negatives, however, things become more complicated because a double negative usually — but not always — creates a positive. Using three negative elements is even worse. Consider a sentence from an instruction that we discussed above:

Innocent misrecollection is not uncommon.

These five words contain no less than three negative elements (*mis-*, *not*, and *un-*), making the sentence very hard to process.

In many jurisdictions the reasonable-doubt instruction is full of negatives. Often, it does little beyond telling jurors which types of doubt are *not* reasonable. Thus, reasonable doubt is “not a mere possible doubt” or “not one based on speculation.” By concentrating on the negative, these instructions fail to tell jurors affirmatively how much proof is necessary to convict. This problem is avoided by a positive standard now used in some federal and state courts: *you must be firmly convinced of the truth of the charge*.

5. Use the active voice

Many sentences can be phrased in both the active and the passive voice:

Active: *John cut down the tree.*

Passive: *The tree was cut down (by John).*

Notice that the active sentence tends to emphasize the actor, John, by placing him first in the sentence (this is the basic SVO sentence structure). In the passive version, John receives less prominence. Indeed, the phrase *by John* can be omitted entirely.

The main reason to avoid passive constructions is that in legal cases it may matter very much who the actor is. Often, the plaintiff or prosecution has to prove certain elements of a cause of action or crime, while the defendant might need to prove a defense. If so, it makes sense to tell jurors that *the prosecution must prove X* and *the defendant must prove Y*, instead of using a passive sentence (*the elements of crime X must be proved*).

Of course, a passive sometimes makes sense, especially when the actor's identity is not legally relevant. On other occasions, a passive verb may simply fit better into the overall flow of a sentence or paragraph.

6. Use modal verbs

Research indicates that people understand language better if it contains straightforward modal or auxiliary verbs (such as *can*, *must*, *should*, *will*), instead of phrases like these:

it is possible for you to (better: *you can*)

it is necessary for you to (better: *you must*)

your duty is to (better: *you must*)

An exception is the modal verb *shall*, which is generally considered somewhat archaic and can mean either “must” (as in most statutes) or “will” (as in *I shall see you tomorrow*). And all too often, it is misused for the simple present tense (*this rule shall apply* — which should be *this rule applies*). It's best, then, to avoid *shall* altogether when charging the jury.

Instructions often refer to the duties of the judge and the jury, typically in language such as the following:

It is now my duty to instruct you on the law that applies to this case. You are required as jurors to follow the instructions that I give you.

Better is something like this:

I will now instruct you on the rules of law that apply in this case. You must follow all my instructions.

Avoid False Economy

We have all heard the complaint that legal language is wordy and redundant. Often, this is true enough. Lawyers tend to *give*, *devise*, and *bequeath* the *rest*, *residue*, and *remainder* of their clients' estates, when it would suffice to say that a client *gives* the *rest* of an estate to the desired beneficiary. Few lawyers have ever been criticized for saying too little or making their briefs too short.

At the same time, jury instructions should not be too sparse. Anyone who has been a teacher knows that effective instruction generally requires making a point — especially a complicated point — in two or three different ways. Examples also help. Saying too little is almost surely worse than saying something too often.

An illustration of false economy is leaving out phrases like *that is* and *which are* (linguists sometimes call this a “whiz deletion”). Instead of referring to *questions of fact that are submitted to you*, you could delete *that are* and refer to *questions of fact submitted to you*. The rules of grammar allow us to delete the phrase *which/that is/are*, but research suggests that it's better to leave the phrase in. Likewise, the complementizer *that* can usually be deleted (*I heard [that] she left home*), but doing so does not always promote clarity. (*The state charged the defendant set the fire.*) Except with simple verbs (*say*, *think*, *hope*), leaving *that* in the sentence usually improves comprehension.

Specific Principles for Drafting Jury Instructions

So far we have discussed various rules and principles that would be useful for any lawyer or judge who wishes to explain legal matters to the general public. Now we turn to some specific issues that arise with jury instructions.

Identify the Parties Clearly and Consistently

It's important to identify the parties to a lawsuit, as well as any other participants, in a clear and consistent way. Many of us have read Russian novels in which a character is referred to as *Boris* on the first page, as *Alexeivich* on the next, and then as *Romanoff*. This variation may be fine in literature, but it has no place in jury instructions. The defendant should be consistently called *Ms. Smith* or *the defendant* or some other appropriate term.

At least in civil cases, it's clearest to use names for the parties, rather than descriptive terms like *plaintiff* or *cross-complainant*. Of course, with multiple parties it may be hard to avoid using a collective term like *the defendants*.

Identifying parties in criminal cases presents a number of issues. Criminal statutes tend to refer to *a person* and *another person*, and some jury instructions follow suit (as in *rape is committed when a person has sexual intercourse with another person without that person's consent*). This is needlessly abstract and makes it hard to keep track of the various *persons*, especially when a third person becomes involved

(e.g., *rape is committed when a person has sexual intercourse with another person and the other person's consent is obtained by the person's threatening to harm yet another person*).

The best solution is simply to refer to the defendant by name or as *the defendant*. Some people object to the latter approach because they believe that referring to *Ms. Smith* as *the defendant* subtly suggests that she might actually have committed the crime. Although it's critical to avoid bias in instructions, this fear seems exaggerated to me — but it does illustrate how sensitive such an apparently minor matter can become. In any event, using names for defendants is probably the best approach.

There are similar problems in deciding how to refer to the prosecution. For the most part, prosecutors seem to despise being called *prosecutor*, even though that's probably the most accurate term; no doubt they cringe at the phonetic similarity of that word to *persecutor*. Calling them *the People* (with a capital P), which is often their own preference, is not the clearest way to refer to them. On the other hand, referring to the prosecutor by name is also not such a good idea, because the case is being brought by the state, not an individual. Perhaps the best term is *the state*, *the commonwealth*, or *the government*. Whatever word you choose, remember to use it consistently.

Use an Example or Illustration to Help Clarify a Difficult Point

An example or illustration is often essential to explaining something clearly. Examples help people visualize and remember things they would otherwise be prone to forget. The mental image of an apple falling on Isaac Newton's head has permanently embedded the concept of gravity into many a child's brain. In law school, the case method, which involves applying abstract rules to the facts of specific cases, serves much the same function. Mention consequential damages, and most lawyers will call to mind the hoary case of *Hadley v. Baxendale*.

Although judges are generally aware of the value of good examples and illustrations, they tend to be nervous about using them in jury instructions. Admittedly, judges have sometimes been reversed for giving the jury an example that, in the stern and unforgiving eyes of the court of appeals, did not accurately reflect the law or slanted the charge in one party's favor. Given the extremely sensitive nature of the instruction on burden of proof in criminal cases, it's probably advisable in most jurisdictions not to give examples or illustrations that attempt to illuminate the reasonable-doubt standard.

But even though examples should be chosen with care, they are extremely helpful in explaining and illustrating difficult concepts. One notion that is virtually impossible to understand without an example is the distinction between direct and circumstantial evidence. There are a number of stock examples relating to footprints in the snow or wet umbrellas. It may take some effort to find foolproof examples for other concepts, but the effort is generally well worthwhile.

Develop a Clear "Template" for the Elements of a Crime or Cause of Action

The real substance of a jury charge is the instructions that lay out the elements of a crime or a cause of action. Moreover, many cases will have more than one count or may have lesser included offenses that differ from each other in critical ways.

Although no one format is best, a good template should be relatively concrete by informing jurors what they need to decide. It should explain who has the burden of proof. It should clearly lay out the elements in a list and explain that all the elements must be met. And it should tell jurors what to do after they have decided that the elements are, or are not, met.

The following instruction on felony interference with civil rights does not meet these criteria very well. It begins by quoting the relevant part of the penal code and then continues:

In order to prove this crime, each of the following elements must be proved:

1. *A person committed the crime of _____;*
2. *That crime was committed against another's [person] [or] [property]; and*
3. *The perpetrator of that crime did so with the specific intent to intimidate or interfere with the alleged victim's free exercise or enjoyment of any right....*

Observe that the introduction to the elements does not specify who should decide whether the elements are true, what the burden of proof is, and who needs to produce the evidence and meet

that burden. The list of elements not only refers abstractly to *a person* and *another person*, but then it shifts gears and refers to *the perpetrator* and *the alleged victim*.

A template like the following is clearer:

You must find the defendant guilty of felony interference with civil rights if the state has proven each of the following elements beyond a reasonable doubt:

1. *The defendant committed the crime of _____;*
2. *He/she committed the crime against the [person] [or] [property] of Ms. Smith; and*
3. *The defendant committed the crime with the specific intent to intimidate or interfere with Ms. Smith's free exercise or enjoyment of any right....*

Incidentally, some prosecutors may object that this template overemphasizes the reasonable-doubt standard, which is almost always explained separately.

If the nature of the state's burden is clear enough from other instructions, including it in the template may not be necessary. On the other hand, in some cases the burden of proof may shift from one party to another on various issues, and the degree of proof may also vary. In that situation, it seems to me, the template should include this information.

Give Jurors Clear Guidance on How to Go About Their Task

Quite often, instructions consist of a jumble of abstract legal principles with little concrete guidance on how to go about the nitty-gritty of reaching a verdict and filling out the verdict form. Of course, unlike their British colleagues, American judges are usually discouraged from commenting on the evidence and explaining how it relates to the jurors' decision. Still, judges in most jurisdictions should be able to give jurors some concrete advice on how to proceed.

Thus, in a breach-of-contract case the judge might instruct jurors that when they begin to deliberate, they should first decide whether there was a valid contract. If not, they should return a verdict for the defendant. On the other hand, if they decide that there was a valid contract, they will then need to decide whether it was breached. If not, verdict for the defense. If so, proceed to the issue of mitigation of damages. And so forth.

Such procedural instructions might be given all at once at the end of the charge. An alternative is to build them into the substantive instructions. At the end of an instruction on murder, for instance, you could add that if jurors decide that the defendant is guilty of murder, they will need to decide whether it is in the first or second degree. If they decide he is not guilty of murder, they will need to move on to the instructions on manslaughter. In addition, or in the alternative, it may be possible to provide this guidance by designing a helpful verdict form that takes jurors step by step through the process of reaching a verdict.

Applying the Principles

No doubt some of the previous discussion has seemed a bit abstract. In an effort to be more concrete, I'd like to present some before-and-after examples of actual jury instructions.

What makes this exercise possible is that California has recently revised all its criminal and civil jury instructions. I cannot take credit for that accomplishment, since many people put a great deal of effort into it. But I was involved in it and am familiar with both the old and the new instructions.

I will draw on the new civil instructions (known as CACI) and compare them to the previous instructions (called BAJI). The CACI instructions were approved by the California Judicial Council in 2003. I'll try to give a selection of instructions that might, roughly speaking, be used in an actual negligence trial.

BAJI 1.00

Respective Duties of Judge and Jury

Ladies and Gentlemen of the Jury:

It is now my duty to instruct you on the law that applies to this case. It is your duty to follow that law.

As jurors it is your duty to determine the effect and value of the evidence and to decide all questions of fact.

You must not be influenced by sympathy, prejudice or passion.

This introductory instruction is not all that bad. Notice, however, the avoidance of the modal verb *must* (*it is my/your duty*). There's also a lot of formal language, such as the reference to the *effect* of the evidence, the use of *determine* instead of the more ordinary *decide*, and the statement that jurors must *decide all questions of fact* (rather than simply telling them to decide what happened).

No new CACI instruction tracks this BAJI instruction exactly, but there is one that is meant to be given at the beginning of trial and that covers similar ground. I have omitted parts of the CACI instruction to make it more parallel to BAJI 1.00:

CACI 100

Preliminary Admonitions

You have now been sworn as jurors in this case.... Before we begin, I need to explain how you must conduct yourselves during the trial.

• • •

You must decide what the facts are in this case . . . based only on the evidence that you hear or see in this courtroom. Do not let bias, sympathy, prejudice, or public opinion influence your verdict.

At the end of the trial, I will explain the law that you must follow to reach your verdict. You must follow the law as I explain it to you, even if you do not agree with the law.

Notice that in the CACI instruction, the judge tells jurors that he or she needs to *explain* the law to them; this is much friendlier than saying that the judge's duty is to *instruct* them, as though they were children in grammar school. When people are giving up their precious time and forfeiting income to serve on a jury, why not address them politely, rather than condescendingly?

The new instruction also avoids the passive construction (*you must not be influenced by sympathy*) in favor of a more forceful active expression: *Do not let sympathy, etc., influence your verdict*. Moreover, *you must decide what the facts are* is much more straightforward and understandable than telling jurors to *decide questions of fact*. I would have preferred, as mentioned, to tell jurors that they must *decide what happened*.

BAJI 1.01

Instructions to Be Considered as a Whole

If any matter is repeated or stated in different ways in my instructions, no emphasis is intended. Do not draw any inference because of a repetition.

Do not single out any individual rule or instruction and ignore the others. Consider all the instructions as a whole and each in the light of the others.

The order in which the instructions are given has no significance as to their relative importance.

This instruction is written in the stilted and turgid style that is so typical of jury instructions. The judge uses the passive voice far too often: *is repeated* and *is intended*. Since it's the judge who repeats and does not intend to emphasize one instruction over the others, why not just say, *If I repeat an instruction or say it in a different way, that does not mean that I intend to emphasize it over other instructions?* And in that third paragraph, why not just say, *The order of these instructions does not matter?*

The CACI version (part of instruction No. 5000) is, once again, considerably more fluent:

Pay careful attention to all the instructions that I give you. All the instructions are important because together they state the law that you will use in this case. You must consider all of the instructions together.

• • •

If I repeat any ideas or rules of law during my instructions, that does not mean that these ideas or rules are more important than the others are. In addition, the order in which the instructions are given does not make any difference.

I couldn't have said it better myself! The tone is dignified, as befits a court of law, but not formal. The instruction uses ordinary English words, avoiding a reference to *drawing any inference* — a phrase reminiscent of a college philosophy lecture. And the syntax is straightforward, using verbs in the active voice.

Below is the equivalent language from the new instructions. It is longer than the terse and almost poetic statements of the old instructions, but the language is also substantially more informative.

BAJI 1.02

Statements of Counsel — Stipulation to a Fact — Evidence Stricken Out — Insinuations of Questions

Statements of counsel are not evidence; [[however, if counsel have stipulated to a fact,] [or] [a fact has been admitted by counsel,] accept that fact as having been conclusively proved.]

Do not speculate as to the answers to questions to which objections were sustained or the reasons for the objections.

Do not consider any evidence that was stricken; stricken evidence must be treated as though you had never known of it.

A suggestion in a question is not evidence unless it is adopted by the answer. A question by itself is not evidence. Consider it only to the extent it is adopted by the answer.

Wow! That second paragraph is especially difficult, containing several levels of embedding. As for terminology, is an ordinary person likely to know what *stipulate* means in this context? The word *stricken* is also a bit odd; usually it means that someone got an awful disease (*she was stricken by smallpox*). And since when do answers *adopt* suggestions? Finally, this instruction is full of verbs in the passive voice: *were sustained*, *was stricken*, *be treated*, and *is adopted* (twice).

CACI 106

Evidence

• • •

The attorneys' questions are not evidence. Only the witnesses' answers are evidence. You should not think that something is true just because an attorney's question suggests that it is true. However, the attorneys for both sides can agree that certain facts are true. This agreement is called a "stipulation." No other proof is needed and you must accept those facts as true in this trial.

Each side has the right to object to evidence offered by the other side. If I do not agree with the objection, I will say it is overruled. If I overrule an objection, the witness will answer and you may consider the evidence. If I agree with the objection, I will say it is sustained. If I sustain an objection, you must ignore the question. If the witness did not answer, you must not guess what he or she might have said or why I sustained the objection. If the witness has already answered, you must ignore the answer.

• • •

An attorney may make a motion to strike testimony that you have heard. If I grant the motion, you must totally disregard that testimony. You must treat it as though it did not exist.

Plain-language instructions are not necessarily longer or shorter than traditional instructions. Sometimes they can make do with fewer words because legal language is often verbose. On other occasions, legal language is so dense and packed with so much information that it's impossible to

express the concepts understandably without using more words.

BAJI 1.02 is a good example of language that is simply too dense and cryptic. It may be fine in a statute, which is meant to be read by lawyers, but it requires additional explanation if ordinary jurors are to understand it. In particular, legal terms like *stipulation*, *sustaining an objection*, and *striking evidence* need to be defined, as the CACI instruction does. Asking jurors to ignore evidence that they heard and that is relevant is very counterintuitive. If we really expect jurors to do so, we need to explain it quite clearly.

Although CACI does a better job of explaining that a lawyer's question is not evidence, the entire concept strikes me as problematic. A question inevitably gives context and meaning to the answer (which is often no more than a *yes* or *no*). Perhaps an example would help the instruction: *For instance, if a lawyer asks a witness, "You saw the defendant kill his mother, didn't you?," that question is no evidence whatsoever of what the witness saw or what the defendant did, unless the witness agrees with it.* On the other hand, perhaps we can count on the common sense of jurors to get this concept right.

BAJI 2.00

Direct and Circumstantial Evidence — Inferences

Evidence consists of testimony, writings, material objects or other things presented to the senses and offered to prove whether a fact exists or does not exist.

Evidence is either direct or circumstantial.

Direct evidence is evidence that directly proves a fact. It is evidence which by itself, if found to be true, establishes that fact.

Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn.

A factual inference is a deduction that may logically and reasonably be drawn from one or more facts established by the evidence.

It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct and circumstantial evidence. Both direct and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

The instruction on circumstantial evidence, which is more common in criminal cases, is nonetheless sometimes given in civil cases. It is undoubtedly one of the more difficult legal notions to impart to jurors.

The typical circumstantial-evidence instruction tends to sound like something written by a German philosopher two centuries ago and then translated word for word into English. How many people today talk about "presenting evidence to the senses?" Is that what you do when you smell a rose or, for that matter, when you see someone rob a bank? Also, most people don't talk much about "drawing inferences," even though they do so every day.

Besides the language, the concept of circumstantial evidence is complex. Although we draw inferences all the time, we seldom sit back and ask ourselves whether the conclusion is based directly on observation or was made through a process of inferential reasoning. If jurors are supposed to decide how they reach their conclusions, they need to be taught how to make this distinction. A clear instruction is essential. In addition, some examples would be very helpful because it's hard to understand the distinction between direct and indirect evidence in the abstract.

A final problem is that *circumstantial evidence* is to some extent what I call a legal homonym: it has a fairly technical legal meaning that differs from how it's ordinarily used. Most people tend to think of *circumstantial evidence* as referring to weak or less reliable evidence, whether direct or indirect.

We might consider trying to avoid this misconception by not using the word *circumstantial* at all. We might substitute *indirect evidence*, which is more descriptive and does not carry with it the baggage that comes with the phrase *circumstantial evidence*. Often such an approach might work, but *circumstantial evidence* is unlikely to go away so easily. Judges and lawyers are used to the term. And more problematic is the misconception that circumstantial evidence is necessarily weaker than direct evidence. We may thus need an instruction that addresses this issue head-on, and to do so we will need to use the term. In my opinion, the new CACI instruction does a reasonably good job in addressing these issues.

CACI 202

Direct and Indirect Evidence

Evidence can come in many forms. It can be testimony about what someone saw or heard or smelled. It can be an exhibit admitted into evidence. It can be someone's opinion.

Some evidence proves a fact directly, such as testimony of a witness who saw a jet plane flying across the sky. Some evidence proves a fact indirectly, such as testimony of a witness who saw only the white trail that jet planes often leave. This indirect evidence is sometimes referred to as "circumstantial evidence." In either instance, the witness's testimony is evidence that a jet plane flew across the sky.

As far as the law is concerned, it makes no difference whether evidence is direct or indirect. You may choose to believe or disbelieve either kind. Whether it is direct or indirect, you should give every piece of evidence whatever weight you think it deserves.

Notice that the instruction starts out with a nice general introduction. The second paragraph then explains the difference between the two types of evidence and includes a useful example. It also explains that the terms *indirect evidence* and *circumstantial evidence* mean the same thing, since many jurors will be familiar with the latter term. And then, in the last paragraph, it tells jurors what to do with the information.

It's interesting that the instruction never specifically defines the two types of evidence. Presumably, most people can figure out the difference from the examples. Any effort to explain the difference inevitably begins to sound like that German philosopher. Examples, without more, may well be the best way to go in this case.

BAJI 2.60

Burden of Proof and Preponderance of Evidence

• • •

“Preponderance of the evidence” means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.

You should consider all of the evidence bearing upon every issue regardless of who produced it.

Obviously, explaining who has the burden of proof and the nature of that burden is extremely important. But research suggests that jurors often poorly understand or confuse standards like preponderance of the evidence and proof beyond a reasonable doubt.

The definition of the preponderance standard in BAJI 2.60 starts off well enough by stating that the evidence must have more convincing force than the opposing evidence. But the next sentence is pretty bad, especially the use of the verb *preponderate*. The noun form, *preponderance*, does occasionally occur in highly formal nonlegal contexts. But the verb *preponderate* is extremely rare. I’m not sure that I’ve ever heard it in ordinary spoken English.

CACI 200

Obligation to Prove — More Likely True Than Not True

A party must persuade you, by the evidence presented in court, that what he or she is required to prove is more likely to be true than not true. This is sometimes referred to as “the burden of proof.”

After weighing all of the evidence, if you cannot decide that something is more likely to be true than not true, you must conclude that the party did not prove it. You should consider all the evidence, no matter which party produced the evidence.

In criminal trials, the prosecution must prove that the defendant is guilty beyond a reasonable doubt. But in civil trials, such as this one, the party who is required to prove something need prove only that it is more likely to be true than not true.

In my view, this instruction is considerably more understandable than the BAJI version. It states the burden clearly: whether something is *more likely than not* to be true, a phrase that is common in everyday speech. Gone are *preponderate* and *preponderance*. The instruction also does something that can be useful for jurors: it addresses a possible misconception head-on by distinguishing this standard from the criminal burden of proof.



BAJI 3.00

Negligence — Essential Elements

The plaintiff _____ [also] seeks to recover damages based upon a claim of negligence.

The essential elements of this claim are:

1. The defendant was negligent;
2. Defendant's negligence was a cause of [injury] [damage] [loss] [or] [harm] to plaintiff.

After all these preliminary matters, we finally get to the meat of the matter: the elements of the cause of action. The most basic civil cause of action is negligence, and the BAJI instruction states the essential elements understandably enough, although the meaning of *negligence* in this context will obviously have to be explained in a later instruction. One relatively minor quibble is that the BAJI instruction seems to collapse what are really two elements: (1) that the plaintiff was harmed and (2) that the defendant caused that harm. You'll observe below that these are indeed two elements in the new instruction.

Although the elements are stated fairly well, a more basic problem is whether jurors will understand what it means to say that two things are *elements of this claim*. The instruction does not tell jurors directly that they will need to decide something and what they will need to decide. Compare the CACI instruction:

CACI 400

Essential Factual Elements

[Name of plaintiff] claims that [he/she] was harmed by [name of defendant]'s negligence. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] was negligent;
2. That [name of plaintiff] was harmed; and
3. That [name of defendant]'s negligence was a substantial factor in causing [name of plaintiff]'s harm.

This instruction illustrates another way in which the CACI instructions are preferable to the BAJI: they use the parties' names instead of *plaintiff* and *defendant*. When the BAJI instructions were originally written, it was hard to customize them. But modern computer technology makes it much easier to have software fill in the names, and there is no good excuse for not doing so, especially when stating the elements of the cause of action.

Notice that what jurors are expected to decide, as well as who has the burden of proof, is also much clearer.

Having set forth the elements for a negligence cause of action, we now need to define *negligence* more exactly. Let's assume that we're dealing with a minor automobile accident and examine some typical instructions.

BAJI 5.50

Duty of Motorists and Pedestrians Using Public Highway

Every person using a public street or highway, whether as a pedestrian or as a driver of a vehicle, has a duty to exercise ordinary care at all times to avoid placing [himself] [or] [herself] or others in danger and to use like care to avoid an accident from which an injury might result.

[A “vehicle” is a device by which any person or property may be propelled, moved, or drawn upon a highway [, excepting a device moved exclusively by human power or used exclusively upon stationary rails or tracks].]

[A “pedestrian” is any person who is afoot or who is using a means of conveyance propelled by human power other than a bicycle.] [The word “pedestrian” also includes any person who is operating a self-propelled wheelchair, invalid tricycle, or motorized quadrangle and, by reason of physical disability, is otherwise unable to move about as a pedestrian, as earlier defined.]

That’s quite a mouthful! Does anyone under the age of 90 still use the term *invalid tricycle* or *motorized quadrangle*? Moreover, *afoot* might be a lovely poetic term but today is used mainly in a metaphorical sense (*there was danger afoot*). And I imagine that most people would think that drawing something upon a highway involves leaving behind graffiti, not pulling or towing something.

CACI 700

Basic Standard of Care

A person must use reasonable care in driving a vehicle. Drivers must keep a lookout for pedestrians, obstacles, and other vehicles. They must also control the speed and movement of their vehicles. The failure to use reasonable care in driving a vehicle is negligence.

Notice that the CACI committee seems to have decided that it’s not necessary to define *pedestrians* — a good decision. As far as I know, *pedestrian* is an ordinary English word with no specific legal meaning. Of course, if the case involves someone in a wheelchair, and if such a person is legally considered a pedestrian, it will be necessary to say so.

Also, the new instruction specifically relates the standard of care to the negligence issue that the jury has to decide (see CACI 400 above) by pointing out that breaching the standard set forth in CACI 700 is negligence. The BAJI instruction simply lays out the duty without telling jurors that a breach of this duty is negligence; the instruction does not tie the duty to the essential elements.

The last sentence in CACI 700 is a bit too formal and uses an unnecessary nominalization (*failure*), thus obscuring — at least to some extent — the actor. It would be plainer and more direct to say, *Drivers who do not use reasonable care are negligent*.



BAJI 5.51

Amount of Caution Required in Ordinary Care — Driver and Pedestrian

While it is the duty of both the driver of a motor vehicle and a pedestrian, using a public roadway, to exercise ordinary care, that duty does not necessarily require the same amount of caution from each. The driver of a motor vehicle, when ordinarily careful, will be alert to and conscious of the fact that in the driver's charge is a machine capable of causing serious consequences if the driver is negligent. Thus the driver's caution must be adequate to that responsibility as related to all the surrounding circumstances. A pedestrian, on the other hand, has only his or her own physical body to manage to set in motion a cause of injury. Usually that fact limits the capacity of a pedestrian to cause injury, as compared with that of a vehicle driver. However, in exercising ordinary care, the pedestrian, too, will be alert to and conscious of the mechanical power acting on the public roadway, and of the possible serious consequences from any conflict between a pedestrian and such forces. The caution required of the pedestrian is measured by the danger or safety apparent to the pedestrian in the conditions at hand, or that would be apparent to a person of ordinary prudence in the same position.

This instruction elaborates on the general standard of care relating to motor vehicles. Apparently, we have left the department of philosophy and are now enrolled in the department of physics. Moreover, the language is extremely stiff and formal.

I believe that it's generally a good idea for instructions to tell jurors why a particular rule applies. People are more likely to comply with an order if they understand its purpose, as opposed to obeying what seems to be an arbitrary command. Yet here the explanation for the rule does not seem too important; just about anyone understands that cars are potentially destructive in a way that ordinary pedestrians are not.

So we can cut out some of the content. As mentioned above, sometimes plainer instructions are necessarily longer than the old-fashioned style. This one, however, can be much shorter than the old one:

CACI 710

Duties of Care for Pedestrians and Drivers

The duty to use reasonable care does not require the same amount of caution from drivers and pedestrians. While both drivers and pedestrians must be aware that motor vehicles can cause serious injuries, drivers must use more care than pedestrians.

What else need be said?

A full set of civil instructions will usually also contain rules on how to calculate damages and some advice on reaching a verdict. But rather than continue with civil instructions, I would like to discuss some of the peculiar problems that can arise in criminal trials.

Some Issues Specific to Criminal Instructions

A critical issue in a criminal case is the presumption of innocence and the burden of proof. The burden of proof is also important in civil cases, of course, but generally it gets even more attention in criminal trials, perhaps because it's a common defense strategy to argue that the burden has not been met, rather than attacking the prosecution's case directly.

In addition, the criminal law is highly statutory, in contrast with the common-law source of contracts or torts. Many states have relatively little codified civil law, and even when they do, they tend not to follow those statutes with nearly the intensity that they place on the penal code. Perhaps because judges consider the civil law to be the result of common-law development by judges themselves, they have fewer inhibitions about stating more comprehensibly the law that they developed.

My experience is that many judges treat the penal code with the same sort of reverence that Moses accorded the tablets God gave him on Mount Sinai. Although the legislature is not divine, judges responsible for criminal jury instructions tend to be very hesitant to deviate from the statutory text. As understandable as those sentiments may be, think of how little impact the Ten Commandments would have had in our modern world if they had not been translated into vernacular languages.

In this section on criminal law, I'll discuss some strategies for dealing with this dilemma: how to be true to the penal code while at the same time speaking ordinary English. This dilemma often arises with the reasonable-doubt instruction, especially if the standard was codified by the legislature at some point. If not formally codified, in many jurisdictions it might as well be: an existing definition may be so entrenched that judges are very reluctant to deviate from it.

In California the definition has resided in Penal Code § 1098 for almost a century, and it appears essentially verbatim in the traditional criminal instructions, known as CALJIC. I'll compare the CALJIC instructions with California's new plain-language instructions, known as CALCRIM. The CALCRIM instructions were created by a California Judicial Council taskforce, of which I was a member. The instructions were submitted for public comment and revised on the basis of those comments. They were approved by the Judicial Council in August 2005.

CALJIC 2.90

Presumption of Innocence — Reasonable Doubt — Burden of Proof

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

Notice that the definition is full of passive verbs (*is presumed; is proved; is shown; is entitled*) and nominalizations (*comparison; consideration; conviction*). It's extremely impersonal in other ways as well: the word *you* does not appear at all, and jurors are referred to in the third person (*leaves the minds of the jurors in that condition that they cannot say*). Finally, it defines *reasonable doubt* almost entirely in the negative (*it is not a mere possible doubt; jurors... cannot say they feel an abiding conviction*). And the phrase *abiding conviction* sounds like it came from a 19th-century hymn.

How can you improve this instruction? Many definitions of *reasonable doubt* in various American jurisdictions are awfully long and convoluted. In England, judges can simply instruct jurors that they must be *sure*. I doubt that such a simple solution would fly in the United States, where the talismanic phrase *beyond a reasonable doubt* is so firmly rooted in our criminal law. A few American jurisdictions do not define the phrase at all,

arguing that it is sufficiently understandable to the ordinary juror. Certainly the words themselves are not unusual. The question is whether the phrase as a whole has acquired a meaning that differs from the sum of the meanings of the individual words. My view is that it has — and that the phrase must be explained or defined.

The exact nature of the standard varies from place to place, but it seems to me that for a jury to find a fact true beyond a reasonable doubt, the jury must:

1. *consider all the relevant evidence that was admitted during the trial;*
2. *be convinced by that evidence that the fact is true; and*
3. *have a sufficiently strong conviction that they consider themselves unlikely to change their minds later.*

I think this standard can be expressed in a relatively straightforward way by incorporating the *firmly convinced* language used by some federal and state courts:

When I tell you that a fact must be “proved beyond a reasonable doubt,” it means that you must be firmly convinced, based on all the evidence that I admitted during the trial, that the fact is true.

Many jurisdictions may not be able to make such a sweeping change because courts over the years have required that specific language be used in instructing the jury. This was true in California, where the definition of *reasonable doubt* in CALJIC 2.90 currently resides in the state's penal code. This posed a big problem for the committee that was revising the CALJIC instructions. The solution was to retain the critical language of the penal code but restructure the grammar.

CALCRIM 103

Reasonable Doubt

I will now explain the presumption of innocence....

A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove each element of a crime [and special allegation] beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise].

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant[s] guilty beyond a reasonable doubt, (he/she/they) (is/are) entitled to an acquittal and you must find (him/her/them) not guilty.

Observe that the negatives found in the CALJIC instruction have been changed into positive statements. While it was considered essential to keep the phrase *abiding conviction*, the phrase is now used to state the burden in a positive way. Rather than defining *reasonable doubt* as *that state of the case which.... leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge*, the revised version requires *proof that leaves you with an abiding conviction that the charge is true*. It's not an ideal formulation; being *firmly convinced* is definitely more understandable than having an *abiding conviction*. But because changing the standard in California would require legislation that is unlikely to be enacted, the CALCRIM instruction is probably the best option under the circumstances.

Another way to deal with obscure statutory language is to keep the statutory term but provide a definition somewhere else in the instruction. For example, the term *malice aforethought* tends not to be understandable to most people, since it does not require malice in the ordinary sense. But lawyers and judges might be reluctant to drop the term entirely because it may be used in the penal code or because they are themselves so used to it. Having a limited number of terms of art in an instruction might not be so bad, as long as they are properly defined. Below is the original CALJIC instruction on murder, with a few of the options (e.g., killing a fetus and felony murder) omitted:

CALJIC 8.10

Murder — Defined

[Defendant is accused [in Count[s] _____] of having committed the crime of murder, a violation of § 187 of the Penal Code.]

Every person who unlawfully kills a human being with malice aforethought is guilty of the crime of murder in violation of Penal Code § 187.

A killing is unlawful, if it is neither justifiable nor excusable. In order to prove this crime, each of the following elements must be proved:

1. A human being was killed;
2. The killing was unlawful; and
3. The killing was done with malice aforethought.

This instruction is striking in several ways. To begin with, there is too much repetition. Repeating things can sometimes be useful for emphasis, but the elements of murder are stated two times in this short instruction — once in the second paragraph and again in the elements. Why was it necessary to define the crime twice and in slightly different ways? This is bound to create confusion. Of course, if the first paragraph stated the language of the penal code and the list of elements then explained in plain language what the penal code meant, that approach would be more defensible.

Notice also that the instruction is extremely impersonal. By overusing the passive voice and nominal constructions, the instruction virtually never identifies who the actor is or is supposed to be. It states that *the following elements must be proved*, for instance. But who is supposed to prove them? The first element is that *a human being was killed*. But who did the killing? If John Smith is accused of killing Jane Doe, why not tell jurors that they need to decide this? They should be able to figure it out, of course, but why make them go through all the extra work, especially when there's always a chance they will get it wrong.

On the other hand, CALJIC 8.10 is fairly good about trying to define legal terminology. It explains that in the context of murder, an *unlawful* killing is one committed without justification or excuse. It also recognizes that *malice aforethought* needs to be defined:

CALJIC 8.11

“Malice Aforethought” — Defined

“Malice” may be either express or implied.

[Malice is express when there is manifested an intention unlawfully to kill a human being.]

[Malice is implied when:

1. The killing resulted from an intentional act;
2. The natural consequences of the act are dangerous to human life; and
3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.]

• • •

The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed.

The word “aforethought” does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act.

Again, the language is impersonal and also quite stilted, as in *there is manifested an intention unlawfully to kill a human being*.

Moreover, is it really necessary to educate jurors on the difference between *express* and *implied* malice? As far as I can tell, the difference does not bear on the jury’s verdict, and jurors usually don’t have to make a finding on the type of malice.

On the positive side, the instruction tries to clear up some misconceptions that jurors might have, explaining that *malice* does not mean ill will or hatred and that *aforethought* does not necessarily require deliberation.

The new California instruction on murder addresses some of the shortcomings in CALJIC 8.10 and 8.11; here is the new one with a few of the options (e.g., killing a fetus) omitted:

CALCRIM 520

Murder with Malice Aforethought

The defendant is charged [in Count ____] with murder.

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant committed an act that caused the death of another person;
2. When the defendant acted, he had a state of mind called malice aforethought;

AND

3. He killed without lawful excuse or justification.

There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder.

The defendant acted with *express malice* if he unlawfully intended to kill.

The defendant acted with *implied malice* if:

1. He intentionally committed an act;
2. The natural consequences of the act were dangerous to human life;
3. At the time he acted, he knew his act was dangerous to human life;

AND

4. He deliberately acted with conscious disregard for human life.

Malice aforethought does not require hatred or ill will toward the victim....

For some reason, the members of the CALCRIM committee decided that it was necessary to educate jurors on the distinction between express and implied malice. In addition, my preference would have been to use names instead of *defendant* and *another person*. But on the whole, the instruction strikes me as quite a bit clearer than the original CALJIC instruction.

Conclusion

In the real world, perfect communication of legal concepts to every member of a jury is certainly impossible. The law is often complicated, time is short, and the educational level of jurors can vary substantially. Yet while complete understanding may be unrealistic, there is absolutely no doubt that we can explain the law to jurors much more clearly than we have done traditionally.

Too often in the past, these challenges have served as an excuse for not even trying. Fortunately, today there are far more resources available on how to clearly communicate legal concepts to nonlawyers. Several jurisdictions, including some of the federal courts, have used plainer jury instructions for a number of years, and the sky has not fallen. Most recently, California has produced hundreds of plain-language instructions that can serve as models for other jurisdictions. There's no longer any excuse for waiting.

Not every jurisdiction will want to undertake a wholesale revision of its instructions or have the resources to do so. Over time, however, existing instructions can be gradually revised. And new instructions will be crafted in response to changes in the law. Why not write them as clearly as possible?

Make no mistake — writing comprehensible jury instructions is not as easy as it might seem at first. But there are several reasons for going through the effort.

First, a well-instructed jury is likely to accomplish its task faster, with shorter deliberation times and with fewer questions about the instructions. Research shows that jurors spend a lot of time discussing their instructions. Clearer instructions should reduce needless debate about what the judge meant.

Second, comprehensible instructions should increase the satisfaction jurors feel after the process is over. If you have ever purchased something that needs some “simple” assembly by the user — only to be confronted with convoluted instructions written by non-English-speaking engineers who used a lot of technical vocabulary and who did not bother to add a diagram illustrating what the item should look like when you finish — you can understand the frustration that jurors sometimes feel.

Finally, justice demands no less. The quality of a jury's verdict depends critically on the clarity of the instructions. We expect ordinary citizens to resolve disputes, to assess damages, to send people to prison, and sometimes even to vote on putting someone to death. Confidence in the legal system requires that those critical decisions be made by jurors who understand the law.

Additional Resources

Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306 (1979).

Amiram Elwork, Bruce D. Sales & James J. Alfani, *Making Jury Instructions Understandable* (The Michie Co. 1982).

Joseph Kimble, *How to Mangle Court Rules and Jury Instructions*, in *Lifting the Fog of Legalese: Essays on Plain Language* 105 (Carolina Academic Press 2006).

Allan Lind & Anthony Partridge, *Suggestions for Improving Juror Understanding of Instructions*, in Federal Judicial Center, *Pattern Criminal Jury Instructions* 161 (1988).

Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 Land & Water L. Rev. 59 (1998).

William W Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 Cal. L. Rev. 731 (1981).

Peter M. Tiersma, *The Language of Jury Instructions*, <http://www.languageandlaw.org/JURYINST.HTM> (accessed Feb. 4, 2006).

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Richard C. Wydick, *Plain English for Lawyers* (5th ed., Carolina Academic Press 2005).

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